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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 693.

BERTHA V. MOORE,

Petitioner,

v.

THE P. W. PUBLISHING COMPANY, INC.,

Respondent.

BRIEF OF THE P. W. PUBLISHING COMPANY, INC.
In Opposition to Allowance of Writ of Certiorari.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

The respondent, The P. W. Publishing Company, Inc., respectfully prays this Court, that the petition for certiorari filed herein be denied for the following reasons:

First: That the petition for certiorari filed herein fails to show that this Court has jurisdiction thereof, under Section 1257 of the Federal Judicial Code.

Second: That said petition fails to show that any federal question was involved:

(a) In the decision of the trial court; or

(b) The Ohio Court of Appeals; or

(c) The Supreme Court of Ohio.

Third: That the decision of the Ohio Supreme Court was based merely on the question of the legal sufficiency of the petition, and of the evidence adduced in the trial court, necessary to support an action for libel per quod, and was not based on any federal question.

Fourth: That the involvement of a federal question was not at any time raised or presented by the petitioner, or adjudicated by either the trial court, the Ohio Court of Appeals, or the Supreme Court of Ohio.

Fifth: The judgment of the Supreme Court of Ohio is based on adequate and independent state grounds.

AS TO JURISDICTION.

The petitioner, as to jurisdiction, claims that this case falls within the provisions of 28 U. S. Code, Section 1257. The applicable part of this section is as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> "(3) By writ of certiorari, where * * * any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of * * * the United States. June 25, 1948, c. 646, 62 Stat. 929."

We submit that under the circumstances shown by the plaintiff's petition and her brief in support thereof, there is no error of constitutional dimensions or of a substantial federal question, shown and that the petitioner has stated no case which may be reviewed by this Court.

Supreme Court Rule 23 (f) in respect to certiorari to review a state court decision, requires that the petitioner's statement shall specify the stage in the proceedings,

in the Court of first instance and in the Appellate Court, to which, and the manner in which the federal questions sought to be reviewed were raised, and the method of raising them and the way they were passed on by the court, as will show the federal question was timely and was properly raised.

Petitioner does not comply with this rule of the Supreme Court, for the obvious reason that a constitutional or federal question was at no time raised in the state courts.

QUESTIONS PRESENTED.

As to petitioner's statement of "questions presented," this respondent, The P. W. Publishing Company, Inc., submits that the petitioner's statement of the questions presented is entirely erroneous.

It is universally held, that where the publication is libelous per se, damages are presumed. Where, however, the publication is libel per quod, no recovery may be had unless special damage is both alleged in the petition, and proven by the evidence. This rule is universally recognized and no citation of authority is necessary.

The alleged libel here involved, concededly is not one of a libel per se. The Ohio Supreme Court held that in a libel per quod, special damages must be both pleaded and proven. The court held that the petitioner had failed to plead special damages and further that there was no proof of special damages. That in the absence of both pleading and proof of special damages, the judgment of the lower court had to be, and was, reversed.

The actual question, then, is simply this:

> Where the petitioner does not allege a libel per se, but merely alleges a libel per quod, and the petition fails to allege special damages, and the evidence fails to

show special damages, and the State Supreme Court, for this reason denies a recovery, has the petitioner been denied "any title, right, privilege or immunity" under the Constitution of the United States, such as would warrant the allowance of a writ of certiorari?

We submit that under such circumstances, the petitioner cannot claim that she has been denied any federal constitutional or statutory right, and that the petition for certiorari, in this Court is not authorized by Section 1257. The fact that the respondent, The P. W. Publishing Co., Inc., may have claimed immunity under the federal constitution, cannot aid this petitioner, who failed to "specially set up or claimed" any right under the constitution or statutes of the United States, and especially so where the state supreme court did not pass on any federal question, in respect to the claims of either the petitioner or the respondent.

AS TO PETITIONER'S STATEMENT OF CASE.

Petitioner's "statement of case" can be clarified somewhat, by pointing out that the alleged libel grew out of the May 1962 Ohio political primary. Governor DiSalle, in this primary, was opposed by Hon. Mark McElroy, as the candidate for Governor. Both the petitioner, Bertha V. Moore, and William O. Walker, the president of The P. W. Publishing Company, Inc., the respondent herein, opposed the candidacy of Governor DiSalle. Bertha V. Moore and William O. Walker were personal friends.

The petitioner, Bertha V. Moore, gave her political primary support to Mark McElroy. However, McElroy was defeated in this political primary. Petitioner, Bertha V. Moore, a Democrat, could expect no political favors from Rhodes, should he be elected in the subsequent November general election. The petitioner, therefore, wisely turned her November general election support to Governor DiSalle.

It should be noted that Governor DiSalle and the petitioner, Bertha V. Moore, were both public political characters and both were office holders, she being at the time a Deputy Registrar of motor vehicles.

It should be further noticed that the alleged libelous publication was a castigation of DiSalle, because of his alleged treatment of the petitioner, Bertha V. Moore. A critical examination of the publication complained of, will readily disclose that the publication was in no wise in derogation, or critical of Mrs. Moore and, on the contrary, the alleged libelous publication, came to her defense, as against the alleged statements of the Governor. It was no wise a libel on her, even though it was severely critical of the Governor.

The same observation may be made of the October 6 and October 13, 1962 publications, which appear as Appendix 8 attached to petitioner's brief.

The publication of October 6 states:

> "Who is, or what is, an Uncle Tom? Certainly Mrs. Bertha Moore, a leader of Negro Democrats in the City of Akron, is not one."

The publication of October 13 contains the language:

> "Mrs. Bertha Moore of Akron is another victim of the DiSalle regime."

> "He called Mrs. Moore an Uncle Tom to her face simply because she asked the Governor why more Negro citizens had not been appointed to jobs in Akron."

Definitions of Uncle Tom contained in petitioner's Appendix 7 were not a part of the Record.

On page 7 of petitioner's statement of case, there appears a most unfortunate statement by counsel for the petitioner. The political affiliations of the Supreme Court of Ohio are referred to. The inference is that their political affiliations induced the judgment herein sought to be reviewed. What induced the seventh member of the Supreme Court of Ohio, to concur with the six alleged Republican judges is not explained, all seven judges having concurred in the decision.

The statement on page 8 of petitioner's brief, is equally unfortunate in stating that the Supreme Court of Ohio,

> "in an obvious effort to foreclose review by this court, attempted to place full reliance in reversing the judgment below on the grounds it regarded as non-federal."

These statements cannot be regarded as anything short of impeaching the judicial integrity of the members of the Supreme Court of Ohio.

It is important to note that the Call and Post is a Negro newspaper, published by Mr. W. O. Walker, also a Negro, which newspaper had a circulation of only 500 copies in a Summit county population of 500,000. The circulation was primarily among Negroes and petitioner failed to show that anyone had read the publication, or was in any manner influenced by the publication.

AS TO THE RIGHT OF TRIAL BY JURY.

The petitioner claims that merely because the state trial court erroneously submitted the issues to the jury, and because the jury returned a finding and verdict in her favor, the judgment became impregnable and not subject to review by the Supreme Court of Ohio. That under Amendment VII and Amendment XIV of the Constitution of the United States, the Supreme Court of Ohio could not review or reverse the judgment of the lower courts, even though erroneous.

Now, it has been uniformly held that Amendment VII of the federal Constitution, in respect to the right of trial by jury, applies only to federal courts, and has no application to right of trial by jury in the state court.

However, right of trial by jury in a federal court, under Amendment VII of the federal Constitution, has uniformly been held not to be applicable under all facts and under all circumstances. A federal court may still direct a jury to find a verdict for the defendant, where the facts warrant such direction. Jurisdiction of the U. S. Supreme Court does not attach where the federal trial court's direction was proper.

"That the circuit court directed the jury to find a verdict for the defendant does not give this court jurisdiction on the ground that the plaintiff was deprived of the right of trial by jury and, therefore, that the case involves the Constitution or application of the Constitution of the United States."

Treat Mfg. Co. vs. Steel & Iron Co., 157 U. S 718; 39 L. Ed. 853.

Moreover, it is held that there is nothing in Amendment XIV of the federal Constitution, which requires a jury trial in a federal court.

"5. Trial by jury is not embraced in the rights secured by the 14th amendment to the Federal Constitution."

Hawkins vs. Bleakley, 243 U. S. 210; 61 L. Ed. 678.

Again, a state statute does not deny federal due process of law, merely because the state statute does not provide for or permit a trial by jury.

"2. A judgment founded upon a state statute is not wanting in due process of law because the statute does not provide for or permit a trial by jury."

Marvin vs. Trout, 199 U. S. 212; 50 L. Ed. 157; Affirming 70 O. S. 437.

Thus, where a state supreme court denied plaintiff recovery, for libelous statements contained in a pleading, because such statements were privileged, this Court held that such a disposition of the case in the state court, involved no question of a federal nature which would support a review by this Court.

Abbott vs. Natl. Bank of Commerce, 175 U. S. 409, 44 L. Ed. 217.

So, likewise, as in the case at bar, for a state court to deny a plaintiff recovery, for libel per quod, because of lack of pleading allegations, and lack of proof of special damage, is a matter of general law, and involves no constitutional, statutory, or federal question, sufficient to support the allowance of a review by certiorari.

The Supreme Court of Ohio, in *Keller vs. Stark Electric Railway Co.*, 102 O. S. 114, fully sets forth the application of Article I, Section 5, of the Constitution of Ohio, relative to the right of trial by jury, as it applies to Ohio jurisprudence:

> "1. The sustaining of defendant's motion, at the conclusion of all the evidence, to withdraw the case from the consideration of the jury and render judgment for the defendant, upon the ground that there has been no evidence introduced tending to prove some essential averment of plaintiff's petition, does not involve a question arising under the Constitution of the United States or of this State."

It would be a strange doctrine, indeed, if a litigant were entitled to a jury trial:

(a) Where his petition (as in the case at bar) does not state a cause of action; and

(b) Where the petition and the evidence does not legally warrant a recovery.

The Supreme Court stated:

> "The failure to plead such special damages would have barred proof of such; but none was offered."

This is the extent of the decision of the Ohio Supreme Court, herein sought to be reviewed. The rule in respect to either a directed verdict, or a final judgment, on review, is substantially the same, in both a state or federal court.

CONCLUSION.

In conclusion, we submit:

First: That the petition for the allowance of a writ of certiorari fails to disclose that this Court has jurisdiction thereof under Section 1257 of the Federal Judicial Code.

Second: That the petition fails to show that any constitutional, statutory or federal question was either claimed or adjudicated by the Supreme or lower Courts of the State of Ohio.

Third: That the adjudication made by the Supreme Court of Ohio was based solely on the insufficiency of both pleading and proof, a purely state question of general law, and not one involving a constitutional, statutory or federal question.

For the above-stated reasons, we submit that the writ of certiorari should be denied.

Respectfully submitted,

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